HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C-282–12 OF 2019 AND WA-24C-283–12 OF 2019
LIM CHONG FONG J
2 JUNE 2020

Building and Construction Law — Dispute resolution — Adjudication — Application to seek direct payment from principal — Whether plaintiff had right to request for direct payment from respondent — Whether failure to issue mandatory notice under s 30(2) of the CIPAA was fatal — Construction Industry Payment and Adjudication Act 2012 s 30

These were applications seeking for a direct payment from principal under s 30 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). The plaintiff and defendant were both private limited companies involved in the piling business. By a letter of award dated 10 April 2017 ('contract'), the plaintiff was appointed by Civil Tech Sdn Bhd ('CTSB') to carry out and complete works described as the supply of skilled labour, machinery and equipment for certain bored pile works for the project known as 'The Construction and Completion of Proposed Sungai Besi-Ulu Kelang Elevated Expressway' ('SUKE Project'). The main contractor of the SUKE Project was ML Sepakat & CHEC Joint Venture who in turn subcontracted the bored piles works under the SUKE Project to CHEC Construction (M) Sdn Bhd ('CCMSB'). Consequently, CCMSB sub-subcontracted part of the aforementioned bored pile works to the defendant who in turn sub-subcontracted SUKE-CA4 package on bored piling works to CTSB by virtue of a letter of award dated 8 December 2016 ('principal contract'). The plaintiff duly carried out its work under the contract as well rented the equipment to CTSB pursuant to the rental agreement until CCMSB and the defendant mutually terminated their sub-subcontract on 19 December 2017. As a result, the contract and rental agreement were also terminated accordingly. That notwithstanding, CTSB failed to fully pay the plaintiff under the contract and failed to pay the plaintiff any money under the rental agreement. The plaintiff initiated adjudication proceedings under CIPAA against CTSB pursuant to the contract and rental agreement separately and succeeded in both proceedings. Despite being served with the two adjudication decisions above, the respondent failed, refused or neglected to pay the plaintiff. The plaintiff had vided its solicitor's letter made a written request to the defendant for direct payment of the relevant adjudicated amounts pursuant to the adjudication decisions made under the contract. Further the plaintiff had via two letters also made a written request for the relevant adjudicated amount in relation to the

rental agreement. By reason of the defendant's failure, refusal or neglect the plaintiff instituted both this originating summons herein. The defendant's contend that it had paid CTSB against all progress certificates and therefore there was no longer any money due or payable to CTSB, there was instead money payable by CTSB to the defendant based on the final accounts of the defendant The issues to be determined were: (a) whether the plaintiff has the statutory right to request for direct payment from the defendant; and (b) whether the failure of the defendant to issue a mandatory notice under s 30(2) of the CIPAA was fatal to its defence.

Held, allowing both applications with costs of RM7,500:

(1) Since the plaintiff had procured adjudication decisions against CTSB, the plaintiff had the statutory right to request for direct payment from the defendant. Towards this end, the plaintiff had pursuant to s 30(1) of the CIPAA served the request on the defendant and in consequence, the defendant was required by s 30(2) of the CIPAA to serve a notice in writing to CTSB to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice. It was mandatory on the defendant to do so. However and since the defendant had failed to comply with s 30(2) of the CIPAA, it was bound to pay the adjudicated sums pursuant to the adjudication decisions to the plaintiff directly (see paras 21–22).

(2) The failure of the defendant to issue the mandatory notice under s 30(2) of the CIPAA to CTSB without any reasonable explanation. This was likewise fatal to its defence against the plaintiff based on s 30(3) of the CIPAA. Nonetheless even if s 30(3) still to be read together with s 30(5) of the CIPAA, it would be presumed that the plaintiff had not been paid by CTSB (see para 25).

(3) The plaintiff here may seek for direct payment from the defendant in respect of any money due or payable. This was therefore not limited to the unpaid money due pursuant to progress certificates issued by the defendant to CTSB but any other money payable by the defendant to CTSB as at the date the defendant received the notices pursuant to s 30(1) of the CIPAA from the plaintiff. Ordinarily, this other money payable will include any uncertified progress claims and release of retention money (see para 32).

(4) The defendant's statement of final accounts here suffered the same infirmity. As a result, the court found that the defendant's statement of final accounts was likewise unworthy and unreliable. The court was satisfied that there was a substantial sum of unquantified and uncertified final value of work done as well as release of retention money which was not accounted by the defendant. The production of the final claim had

A been withheld by the defendant here unexplained and the court inclined to draw an adverse inference against the defendant (see para 35–36).

[Bahasa Malaysia summary

B Ini merupakan permohonan untuk mendapatkan bayaran terus dari seorang prinsipal di bawah s 30 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta'). Plaintif dah defendan merupakan syarikat sendirian berhad yang terlibat dalam perniagaan cerucuk. Melalui satu surat bertarikh 10 April 2017 ('kontrak'), plaintif telah dilantik oleh Civil Tech Sdn Bhd ('CTSB') untuk
C menjalankan dan menyelesaikan kerja yang dinyatakan sebagai penyediaan buruh mahir, jentera dan peralatan untuk kerja cerucuk untuk projek yang dikenali sebagai Pembinaan dan Penyelesaian Lebuhraya Bertingkat Sungai Besi-Ulu Kelang yang dicadangkan ('Projek SUKE'). Kontraktor utama Projek SUKE adalah ML Sepakat & Usahasama CHEC yang telah memberikan
D sub-kontrak kerja cerucuk gerek dibawah Projek SUKE kepada SCHEC Construction (M) Sdn Bhd ('CCMSB') yang kemudiannya telah memberikan sub-sub kontrak pakej SUKE-CA4 kerja cerucuk gerek kepada CTSB melalui satu surat awad bertarikh 8 Disember 2016 ('kontrak prinsipal'). Plaintif telah menjalankan kerjanya dibawah kontrak dan menyewakan perlatan kepada
E CTSB selaras dengan perjanjian sewaan sehingga CCMSB dan defendan secara bersama menamatkan sub-subkontrak mereka pada 19 Disember 2017. Sebagai kesan, kontrak tersebut dan perjanjian sewaan juga ditamatkan. Namun, CTSB gagal untuk membayar sepenuhnya plaintif dibawah kontrak dan gagal untuk membayar plaintif apa-apa wang dibawah perjanjian sewaan.
F Plaintif telah memulakan prosiding adjudikasi dibawah Akta terhadap CTSB selaras dengan kontrak dan perjanjiaan sewaan secara berasingan dan berjaya dalam kedua-dua permohonan. Walaupun diserahkan dengan kedua-dua keputusan adjudikasi diatas, responden gagal, enggan atau cuai untuk membayar plaintif. Plaintif telah, melalui surat peguamnya membuat
G permohonan secara bertulis kepada defendan untuk pembayaran terus berkaitan dengan amaun adjudikasi selaras dengan keputusan adjudikasi yang dibuat dibawah kontrak. Lanjutan itu, plaintif telah melalui dua surat juga membuat permohonan bertulis untuk amaun adjudikasi yang relevan berkaitan dengan perjanjian sewaan. Atas sebab kegagalan, keengganan atau
H kecuaian plaintif, defendan telah memulakan kedua-dua saman pemula disini. Defendan menyatakan bahawa ianya telah membayar CTSB, dan sebenarnya wujud wang yang perlu berbayar oleh CTSB kepada defndan berdasarkan akaun muktamad defendan. Isu untuk diputuskan adalah sama ada: (a) plaintif mempunyai hak statutori untuk memohon pembayaran terus dari defendan;
I dan (b) sama ada kegagalan defendan untuk mengeluarkan notis mandatori di bawah s 30(2) adalah fatal kepada pembelaannya.

Diputuskan, membenarkan kedua-dua permohonan dengan kos sebanyak RM7,500:

(1) Memandangkan plaintif telah memperoleh keputusan adjudikasi terhadap CTSB, plaintif mempunyai hak statutori untuk memohon pembayaran terus dari defendan. Untuk mecapai matlamat ini, plaintif telah selaras dengan s 30(1) Akta menyerahkan permohonan tersebut kepada defendan dan sebagai kesan, defendan perlu di bawah s 30(2) Akta untuk menyerahkan notis bertulis kepada CTSB untuk mengemukakan bukti pembayaran dan menyatakan bahawa pembayaran terus akan dibuat selepas tamat tempoh sepuluh hari berkerja selepas penyerahan notis. Adalah mandatori untuk defendan berbuat sedemikian. Namun kerana defendan gagal untuk mematuhi s 30(2) Akta, defendan perlu membayar jumlah yang diadjudikasi selaras dengan keputusan adjudikasi kepada plaintif secara terus (lihat perenggan 21–22).

(2) Kegagalan defendan untuk mengeluarkan notis mandatori di bawah s 30(2) Akta kepada CTSB tanpa apa-apa penjelasan munasabah. Adalah *fatal* kepada pembelaannya terhadap plaintif berdasarkan s 30(3) Akta. Namun walaupun s 30(3) dibaca bersama s 30(5) Akta, ianya akan dianggap bahawa plaintif belum dibayar oleh CTSB (lihat perenggan 25).

(3) Plaintif boleh memohon untuk pembayaran terus dari defendan untuk apa-apa wang yang perlu dibayar. Ini tidak terhad kepada wang yang belum dibayar selaras dengan sijil perkembangan yang dikeluarkan oleh defendan kepada CTSB dan apa-apa wang lain yang perlu dibayar oleh defendan kepada CTSB setakat mana tarikh defendan menerima notis selaras dengan s 30(1) Akta daripada plaintif. Secara kebiasaannya wang yang perlu dibayar ini adalah juga termasuk dengan apa-apa tuntutan perkembangan belum disahkan dan pelepasan wang tertahan (lihat perenggan 32).

(4) Penyata muktamad defendan disini juga mempunyai kecacatan yang sama. Sebagai kesan, mahkamah mendapati bahawa penyata akaun muktamad adalah tidak boleh diharap. Mahkamah berpuas hati bahawa sejumlah besar nilai kerja yang akhirnya dilakukan yang belum disahkan dan dikira. Dan juga pelepasan wang tertahan yang belum diakaun oleh defendan. Pengemukaan tuntutan akhir telah dihalang oleh defendan di sini dan tidak dijelaskan dan mahkamah menggunakan tanggapan *adverse* terhadap defendan (lihat perenggan 35–36).]

Cases referred to

CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd [2019] MLJU 1215; [2020] 1 CLJ 75, CA (refd)

Dunlop & Ranken Ltd v Hendell Steel Structures Ltd, Pitchers Ltd (Garnishees) [1957] 1 WLR 1102, QBD (refd)

HMN Nadhir Sdn Bhd v Jabatan Kerja Raya Malaysia & Ors [2018] MLJU

1859; [2018] 1 LNS 1938, HC (refd)
Murni Environmental Engineering Sdn Bhd v Eminent Ventures Sdn Bhd & Anor and other suits [2016] MLJU 691, HC (refd)
PCOM Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor [2020] MLJU 118, HC (refd)
Videocon Global Ltd & Anr v Goldman Sachs International [2016] EWCA Civ 130, CA (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 18(1), 30, 30(1), (2), (5)

Chen Mian Kuang (Low Klan Seng with him) (MK Chen & Leong) for the plaintiff.
Ho Yuk Yuen (YY Ho & Lee) for the defendant.

Lim Chong Fong J:

INTRODUCTION

[1] These are applications to seek for direct payment from principal under s 30 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA').

[2] The plaintiff in both originating summons is a private limited company involved in piling business.

[3] The defendant in both originating summons is also a private limited company involved in the piling business as well.

BACKGROUND FACTS

[4] By a letter of award dated 10 April 2017 ('contract'), the plaintiff was appointed by Civil Tech Sdn Bhd ('CTSB') to carry out and complete works described as the supply of skilled labour, machinery and equipment for certain bored pile works for the project known as 'The Construction and Completion of Proposed Sungai Besi-Ulu Kelang Elevated Expressway' ('SUKE project').

[5] The main contractor of the SUKE Project is ML Sepakat & CHEC Joint Venture who in turn subcontracted the bored piles works under the SUKE Project to CHEC Construction (M) Sdn Bhd. Consequently, CHEC Construction (M) Sdn Bhd ('CCMSB') sub-subcontracted part of the aforementioned bored piles works to the defendant who in turn

sub-sub-subcontracted the SUKE-CA4 package on bored piling works to CTSB by virtue of a letter of award dated 8 December 2016 ('principal contract'). A

[6] In addition by a rental agreement dated 21 August 2017 ('rental agreement'), the plaintiff rented a unit of Bauer Boring Rig RB28 c/w Kelly Bar ('equipment') to CTSB for purposes of carrying out the bored piling works under the same aforementioned SUKE-CA4 package. B

[7] The plaintiff duly carried out its work under the contract as well rented the equipment to CTSB pursuant to the rental agreement until CCMSB and the defendant mutually terminated their sub-subcontract on 19 December 2017. As a result, the contract and rental agreement were also terminated accordingly. That notwithstanding, CTSB failed to fully pay the plaintiff under the contract and failed to pay the plaintiff any money under the rental agreement. C D

[8] As a result, the plaintiff initiated adjudication proceedings under the CIPAA against CTSB pursuant to the contract and the rental agreement separately. E

[9] The plaintiff succeeded in both adjudication proceedings.

[10] In respect of the adjudication pursuant to the contract, the adjudicator ordered as follows in his adjudication decision dated 30 August 2018: F

(a) the respondent shall pay to the claimant the outstanding unpaid certified sum of RM1,598,086.52 (comprising of RM29,688.43 balance to be paid for the four tax invoices and RM1,568.398.09 (excluding GST) for progress claim No 9 (rev)) within 30 calendar days after receiving this adjudication decision; G

(b) the respondent shall bear the costs of these proceedings amounting to RM43,538.10, the respondent is to pay the claimant the sum of RM43,538.10 within 30 calendar days after receiving this adjudication decision; H

(c) the claimant is entitled to 5%pa 'post award' interest from the date of this adjudication decision until the date of full settlement; and

(d) the payments under A, B and C above are to be made by cheque, banker's cheque, cash or online transfer of funds into the claimant's bank account. I

[11] As to the adjudication pursuant to the rental agreement, the adjudicator ordered as follows in his decision dated 20 August 2018:

A (a) the payment of RM205,476.96 of the said tax invoices sought in the payment claim by the claimant are ALLOWED accordingly;

(b) the interest at the rate of 1% per month on the sum of RM48,923.08 shall calculate from 11 October 2017 until full settlement are ALLOWED accordingly;

B

(c) the interest at the rate of 1% per month on the sum of RM127,200 shall calculate from 2 November 2017 until full settlement are ALLOWED accordingly;

C (d) the interest at the rate of 1% per month on the sum of RM29,353.88 shall calculate from 6 December 2017 until full settlement are ALLOWED accordingly;

(e) the respondent shall pay the adjudicated sum of RM205,476.96 plus interest at the rate of 1% per month (calculation method as stated in the above);

D

(f) the respondent shall pay the adjudicated sum within seven days to the claimant from the date of this adjudication decision in the manner of banker's cheque;

E

(g) pursuant to s 18(1) of the CIPAA, being as losing party, the respondent shall pay the cost of adjudication proceeding amounting to RM10,301.90 to the claimant being reimbursement of the claimant of payments made towards the KLRCA's administrative costs and adjudicator's fees, in the manner of banker's cheque within seven days from the date of this adjudication decision; and

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(h) the respondent shall pay the sum of RM5,000 being party and party cost in the manner of banker's cheque within seven days from the date of this adjudication decision.

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[12] Subsequently despite having been served with the both the aforementioned adjudication decisions, CTSB failed refused or neglected to pay the plaintiff.

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[13] The plaintiff therefore through its solicitor's letters of both dated 15 October 2018 made a written request to the defendant for direct payment of the relevant adjudicated amounts pursuant to the adjudication decision made under the contract. In addition, the plaintiff also through its solicitor's letters dated 19 September 2018 and 20 September 2018 made a written request to the defendant for direct payment of the relevant adjudicated amounts pursuant to the adjudication decision made under the rental agreement.

I

[14] By reason of the defendant's failure, refusal or neglect to make the payments to the plaintiff directly, the plaintiff hence on 31 December 2019 instituted both this originating Summons Nos WA-24C-282–12 of 2019 ('OS1') and WA-24C-283–12 of 2019 ('OS2') in respect of the adjudication decision under the rental agreement and adjudication decision under the contract respectively.

[15] The affidavits that were filed for purposes of OS1 are as follows:

(a) plaintiff's affidavit in support affirmed by Lee Kai You dated 27 December 2019;

(b) defendant's affidavit in reply affirmed by Mohd Khairul Pahmi bin Muhammad dated 5 February 2020; and

(c) plaintiff's second affidavit affirmed by Lee Kai You dated 11 February 2020.

[16] Likewise, the affidavits that were filed for purposes of OS2 are as follows:

(a) plaintiff's affidavit in support affirmed by Lee Kai You dated 27 December 2019;

(b) defendant's affidavit in reply affirmed by Mohd Khairul Pahmi bin Muhammad dated 5 February 2020; and

(c) plaintiff's second affidavit affirmed by Lee Kai You dated 11 February 2020.

[17] In addition, the plaintiff also filed its notice of intention to rely on the following affidavits filed in relation to KLHC Civil Suit No WA-22C-11–02 of 2019:

(a) plaintiff's affidavit in reply affirmed by Lee Kai You dated 27 December 2019; and

(b) plaintiff's second affidavit affirmed by Lee Kai You dated 3 February 2020.

[18] The hearing of both OS1 and OS2 came before me for hearing on 6 March 2020. After having read the written submissions filed by the parties and oral arguments of counsel, I deferred my decision to deliberate on them.

[19] Now having done so, I give my decision below together with the supporting grounds.

A CONTENTIONS AND FINDINGS

[20] These are applications made under s 30 of the CIPAA which reads as follows:

B 30 Direct payment from principal

(1) If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication C decision is made.

(2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.

D (3) In the absence of proof of payment requested under subsection (2), the principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour.

(4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against E whom the adjudication decision was made.

(5) This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1).

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[21] According to the plaintiff, it is not in dispute that the defendant is the principal of CTSB. Since the plaintiff has procured adjudication decisions against CTSB, the plaintiff has the statutory right to request for direct payment from the defendant. Towards this end, the plaintiff has pursuant to s 30(1) of G the CIPAA served the request on the defendant and in consequence, the defendant is required by s 30(2) of the CIPAA to serve a notice in writing to CTSB to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice. It is mandatory on the defendant to do so following the case of *HMN Nadhir Sdn* H *Bhd v Jabatan Kerja Raya Malaysia & Ors* [2018] MLJU 1859; [2018] 1 LNS 1938 and the subsequent Court of Appeal case of *CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd* [2019] MLJU 1215; [2020] 1 CLJ 75.

I **[22]** However and since the defendant has failed to comply with s 30(2) of the CIPAA, it is bound to pay the adjudicated sums pursuant to the adjudication decisions to the plaintiff directly.

[23] The defendant acknowledged that it did not serve the notice under s 30(2) of the CIPAA on CTSB but the defendant nonetheless opposed the plaintiff's application for direct payment here because there is no money due or payable by the defendant to CTSB pursuant to s 30(5) of the CIPAA.

[24] I have recently held as follows in *PCOM Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor* [2020] MLJU 118 in relation to a s 30 of the CIPAA application:

> [20] In *CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd* [2019] MLJU 1215; [2018] 1 LNS 380, Lee Swee Seng J (now JCA) held as follows with emphasis added by me:
>
> > [1] The primary question for determination in this application is whether the principal of a contractor against whom an adjudication decision has been made, is required to make payrnents direct to the claimant under the direct payrnent rernedy provision under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') for a debt which the principal owes its contractor.
> >
> > ...
> >
> > [23] He further argued that this speedy mechanism will be defeated if the principal is permitted to stay silent and refuse disclosure of the sums payable by the principal to the respondent or the party against whom the adjudication decision is made, particularly where both the principal and the delinquent non-paying party against whom the adjudication decision is made are related companies controlled by the same people, as in the present case.
> >
> > [24] Insofar as 30(5) of the is concerned, the defendant has not denied that there are sums due from the defendant (as the principal) to BHL Builders See also *Ng Hee Thoong&Anor v Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 1281 at p 286). I would further agree with the plaintiff that having remained silent, it is clearly an afterthought to then subsequently say in their affidavit filed out of time, that there is no sums owing from them to BHL Builders.
> >
> > [25] *I would agree with the plaintiff that this is not a case where the defendant can seriously dispute the amount to be paid over to the plaintiff especially in the absence of a mandatory notice to BHL Builders under section 30(2) and furhter in the absence of a rebuttal of the the allegation of the Adjudicated Amount to be paid by the defendant to the plaintiff when the defendant had the first opportunity to do so.*
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> I am nonetheless mindful that an appeal was brought and subsequently aflowed by the Court of Appeal as seen in *CT lndah Construction Sdn Bhd v BHL Gemilang Sdn Bhd* [2019] 7 AMR 551 but the above emphasized point is however not disturbed.
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> [21] Furthermore in *HMN Nadhir Sdn Bhd v Jabatan Kerja Raya Malaysia & Ors* [2018] MLJU 1859; [2018] 1 LNS 1938, Lee Swee Seng J (now JCA) also held as follows with emphasis added by me:
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> > [21] It is abundantly clear that 'may' when used in section 30(1) denotes a discretion conferred on the successful claimant with respect to making a request for payment from the principal. The successful claimant is not legally obliged to

take this route for the respondent might pay on their own accord or that there are other modes of execution which are quite effective against the respondent.

[22] Contrast that with the use of the word 'shalf' in both sections 30(2) and (3).

[23] It can only denote a mandatory meaning in that the Principal is legally required to follow up with the action prescribed. There are no two ways about it.

[24] In *Construction Adjudication in Malaysia* (2nd Ed 2018 Sweet & Maxwell) by Lam Wai Loon and Ivan YF Loo, the learned authors in further explaining the application of 30 of the CIPAA commented as follows at p 479:

... The word 'shall' imposes upon the principal a statutory obligation to make payment of the adjudicated amount. It is considered that the result of this obligation to pay creates a cause of action whereupon the winning party may sue the principal for the payment should the principal fail to comply with the obligation to pay.' (Emphasis added.)

[25] *In the present case, the defendant did not issue to the respondent any notice pursuant to section 30(2) of the CIPAA. As the mandatory 'shall' is used in section 30(2), the defendant's failure or refusal to issue the written notice is a breach of section 30(2) of the CIPAA. The defendant's deliberate breach of section 30(2) shall not obstruct the continuation of the direct payment mechanism under section 30(3) of the CIPAA where it provides that in the absence of proof of payment requested under subsection (2), the Principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour. I agree that the plaintiff's contention is supported by the legal maxim Commodum Ex injuria Sua Nemo Habere Debet, in which a wrongdoer should not be enabled by law to take any advantage from his actions.*

[26] *There can be no proof of payment as the defendant had failed or refused to issue the notice pursuant to section 30(2) of the CIPAA. I agreee with the plaintiff that the defendant cannot rely on its breach of section 30(2) to avoid its mandatory obligation to make direct payment under section 30(3) of the CIPAA*.

[22] It is plain that the first defendant did not issue the mandatory notice under s 30(2) of the to the second defendant and this is fatal to the defence that there is no monies due and owing from the first defendant to the second defendant.

[25] There is similarly the failure of the defendant here to issue the mandatory notice under s 30(2) of the CIPAA to CTSB without any reasonable explanation. This is likewise fatal to its defence against the plaintiff based on s 30(3) of the CIPAA per se. Nonetheless even if s 30(3) has still to be read together with s 30(5) of the CIPAA, it would be presumed that the plaintiff has not been paid by CTSB.

[26] The defendant has relied on s 30(5) of the CIPAA by strenuously contending that there is no money due or payable to CTSB; hence the defendant need not accordingly make any direct payment to the plaintiff as sought.

[27] In this regard, it is not in dispute that the plaintiff's claim for the adjudicated sums under the contract and rental agreement were for work done or services rendered pursuant to the same contract between CTSB and the defendant in the chain of contracts of the SUKE Project.

[28] The defendant contended there were progress certificates 1 to 6 issued to CTSB between June 2017 and October 2017 whereby the defendant had progressively paid CTSB a total of RM5,046,507.34 by 20 October 2017. Furthermore according to the defendant, the final accounts of the principal contract between CTSB and the defendant disclosed that there is a net outstanding sum owed by CTSB to the defendant instead because of delay and rectification work carried by the defendant.

[29] It is plainly provided in s 30(5) of the CIPAA that the defendant is only obliged to make direct payment if there is money due or payable to CTSB. It is not due and payable. In the English Court of Appeal case of *Videocon Global Ltd & Anr v Goldman Sachs International* [2016] EWCA Civ 130, it was held that there is a distinction between due and payable in that a debt accrues when it is due whilst an obligation to pay arises when it is payable. They are thus not synonymous and it seems that the former is stricter when compared to the latter. In the English building contract case of *Dunlop & Ranken Ltd v Hendell Steel Structures Ltd, Pitchers Ltd (Garnishees)* [1957] 1 WLR 1102 on garnishment, it was held that money under a building contract based on the RIBA form is not due for attachment until a certificate by the architect has been issued for that sum of money. It is plain that for purposes of garnishment under the then Rules of the Supreme Court of England, only debt due or accruing debt could be garnished. Thus, in my view, if it is just payable instead of due and payable, it suffices so long there is an obligation or liability to pay upon it being properly claimed.

[30] It has been held by Lee Swee Seng J (now JCA) in *HMN Nadhir Sdn Bhd v Jabatan Kerja Raya Malaysia & Ors* as follows in the interpretation of s 30 of the CIPAA:

> [101] We must be careful not to read words into the section which words are not there to make the section read what we want to impose on it ...
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> ...
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> [103] The days of a master wielding absolute powers of interpretation are long gone and in its place are canons of statutory interpretation that all who respect the law and live by it would have to abide by. That gives certainty and guards against capriciousness.
>
> [104] The primary rule of interpretation, the literal rule, should be adopted to interpret the application of section 30 of CIPAA ...

[31] I observed that the defendant asserted that it has paid CTSB against all the progress certificates and there is hence no longer any money due or payable to CTSB. Furthermore, there is instead money now payable by CTSB to the defendant based on the final accounts produced by the defendant.

[32] It was held in *Murni Environmental Engineering Sdn Bhd v Eminent Ventures Sdn Bhd & Anor and other suits* [2016] MLJU 691 which was followed in *HMN Nadhir Sdn Bhd v Jabatan Kerja Raya Malaysia & Ors* that it is not necessary the payment for which the adjudication decision was given must be the same payment for which the plaintiff is seeking enforcement from the principal.

[33] Consequently, the plaintiff here may seek for direct payment from the defendant in respect of any money due or payable. This is therefore not limited to the unpaid money due pursuant to progress certificates issued by the defendant to CTSB but any other money payable by the defendant to CTSB as at the date the defendant received the notices pursuant to s 30(1) of the CIPAA from the plaintiff. Ordinarily, this other money payable will include any uncertified progress claims and release of retention money. The applicable date in which the aforesaid notices were received by the defendant is 15 October 2018 and 20 September 2018 pursuant to the contract and rental agreement respectively.

[34] The defendant in attempt to establish that there is no money due or payable relied on a final account statement dated 3 August 2018. It is stated that the certified amount till progress certificate No 8 is RM5,440,566.69. There is however previous progress payments made to CTSB amounting to RM5,046,507.34 leaving a balance of RM394,059.35. However this amount of RM394,059.35 is subject to the defendant's backcharges due to step in costs arising from debit notes issued by the defendant to CTSB amounting to RM4,004,162.69. In consequence, CTSB owed the defendant the sum of RM3,610,103.34. I observed the aforementioned final account statement has unilaterally been produced by the defendant without the acceptance and/or endorsement of CTSB. In the principal contract, the provisions on payment procedure are as follows wherein the defendant and CTSB are described as the contractor and subcontractor respectively:

> 4. The Contractor shall respond the work done to the Sub-Contractor not later than 45 days from the received of the claim.
>
> 5. The Contractor shall make payment to the Sub-Contractor not later than 45 working days after the received of the claim or invoice whichever earlier.
>
> ...
>
> 7. Final balance payment due shall be released to the Sub-Contractor upon signing the Statement of Final account by both parties.

Upon detail perusal, I find that the defendant's statement of final account which was exhibited in the defendant's affidavit in reply comprised of the master summary, subsummaries and several payment vouchers as well as bank balance statements relating to payment of the progress certificates only.

[35] In *PCOM Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor*, I have further held as follows with emphasis added:

> [24] *Be that as it may, I also find that the exhibited statement of accounts of the purported Reconciliation Exercise has little, if not, evidential value in the absence of cogent substantiating documents in support hereof. In the Court of Appeal case of Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611*, Zainun Ali JCA (later FCJ) held as follows:*
>
> > [70] As in the Popular case, there was also a set of purportedly audited accounts but which lack:
> >
> > (a) Books to substantiate the statements;
> >
> > (b) Accountant/accountants who themselves audited the accounts to testify to the truth and accuracy of the statements.
> >
> > [71] If the said accounts were to be admitted, then someone is to testify from where they were obtained.
> >
> > [72] Thus in the absence of that person of skill to prove the respondent's documents, the respondent's claim for damages remain obscure, unacceptable and consequently inadmissible.
> >
> > [73] The essence of all these is that, the burden of proof in terms of admissibility and relevancy never shifted from the respondent.
> >
> > [74] The respondent was at pains to distinguish the authorities relied upon by the appellant (ie, *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 1 CLJ 133; [1990] 2 CLJ Rep 635 and *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1989] 3 CLJ 1) on the grounds that the said cases do not involve audited accounts being tendered as evidence.
> >
> > [75] However it is our view that this distinction has no basis since the nature of an audited account in the instant case, is no different from the 'sheet of calculations' tendered in the Popular case, or the 'summary of accounts' tendered in the KPM Khidmat case, as these documents are nothing more than general conclusions or results from the books of account or record books.
> >
> > [76] Thus, it would follow that the principles as adopted in both the Popular and KPM Khidmat cases remain binding and applicable.
>
> *Put simply, the statement of accounts is unworthy and unreliable.*

[36] Consequently, I find and hold that the defendant's statement of final accounts here suffered the same infirmity. The crucial supporting documents such as CTSB's progress claims or invoices that would have demonstrate its

position on the final accounts as well as all the defendant's relevant alleged backcharge debit notes were not produced. In addition, the payment vouchers adduced by the defendant appear suspicious as contended by the plaintiff because some of them do not contain any acknowledgment of receipt by CTSB. Moreover, the bank statements produced are not on the letterhead of the bank concerned or with the stamp and signature of the bank on every page of the printed statement as asserted by the plaintiff. As a result, I find and hold that the defendant's statement of final accounts is likewise unworthy and unreliable.

[37] Nonetheless and in the absence of the aforesaid supporting documents, I am satisfied that there is still substantial sum of unquantified and uncertified final value of work done as well as release of retention money of RM518,620.61 which has not been accounted by the defendant for the period that elapsed between the termination of the contract and rental agreement and the defendant's receipt of the notices under s 30(1) of the CIPAA. It was for about nine months. The unquantified and uncertified final value of work done may be ascertained from the final claim of CTSB which would ordinarily have been submitted pursuant to cl 5 of the principal contract. The production of the final claim has been withheld by the defendant here unexplained and I am accordingly inclined to draw an adverse inference against the defendant. I believe that the first claim would reveal a substantial sum payable to CTSB.

[38] In summary, there is hence RM394,059.35 of certified progress payment due and payable as well as RM518,620.61 of release of retention money and a substantial undisclosed final claim sum payable by the defendant to CTSB.

[39] Finally, I also observed that the plaintiff contended that CTSB and the defendant are related and the court should view them with suspicion. Although I am satisfied as counter contended by the defendant that there is neither common shareholder nor director in both the companies, I am still perplexed to see that the defendant was on 20 November 2017 able to use the letterhead of CTSB to communicate with the plaintiff. There is no cogent explanation by CTSB to explain the occurrence.

CONCLUSION

[40] For the foregoing reasons, I find and hold that the plaintiff has made out a meritorious case in respect of both OS1 and OS2. I therefore allow both OS1 and OS2 with costs of RM7,500 subject to 4% allocator for each of them.

Appeal allowed for both applications with costs of RM7,500.

Reported by Izzat Fauzan